

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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OSCAR ALDANA,

Plaintiff,

-v-

No. 10 Civ. 9043 (LTS)(AJP)

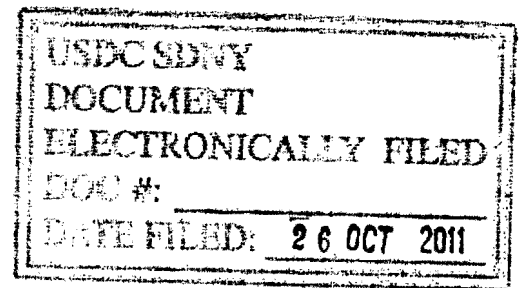
THE DEPARTMENT OF EDUCATION OF  
THE CITY OF NEW YORK et al.,

Defendants.

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**ORDER**

Plaintiff Oscar Aldana has filed an Amended Complaint against The Service Employees Union, CTW, CLC, Local 32 BJ ("the Union") and William A. Guddemi ("Guddemi") alleging wrongful termination in violation of a Collective Bargaining Agreement and Section 9(a) of the National Labor Relations Act. 29 U.S.C. § 159(a). In his original Complaint, Plaintiff pled that Guddemi "had no other choice but to terminate Plaintiff." (Orig. Compl. ¶ 10). The Court found that this statement amounted to a concession that Guddemi had just cause to terminate Plaintiff, and granted Defendants' motion to dismiss for failure to state a claim with leave to amend. On July 8, 2011, Plaintiff filed an Amended Complaint which elaborated on the circumstances leading up to his termination (specifically, that he had kissed a student) and retracted the concession that Guddemi was forced to terminate him. Guddemi now moves to dismiss the Amended Complaint on the grounds that (1) Plaintiff has inadvertently pled just cause for his termination by admitting that he kissed a student, and (2) the Court should treat Plaintiff's concession in the original Complaint as true, notwithstanding his elimination of the




language from the Amended Complaint.

Insofar as Defendant is relying on an admission outside the operative pleading, whose accuracy and significance the Plaintiff contests, this motion is more appropriately treated as one under Federal Rule of Civil Procedure 56. See Fed. R. Civ. P. 12(d). Accordingly, the parties will be given an opportunity to make evidentiary and further legal submissions.

Guddemi is directed to file and serve, with a courtesy copy to the Court, a statement of material facts as to which Defendant contends there is no genuine dispute with respect to the motion, pursuant to Southern District of New York Local Civil Rule 56.1, and any supplemental affidavits, memorandum of law, or other materials in support of his motion, by November 11, 2011. Guddemi is directed to make factual and legal proffers regarding Plaintiff's placement on the ineligible for hire list and its effect on his termination, as well as the meaning of "just cause" under the Collective Bargaining Agreement. Plaintiff's response pursuant to Local Rule 56.1 and any supplemental materials in opposition are to be filed and served, with a courtesy copy to the Court, no later than November 30, 2011, with any materials submitted in reply by Defendant due December 9, 2011.

SO ORDERED.

Dated: New York, New York  
October 26, 2011

  
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LAURA TAYLOR SWAIN  
United States District Judge